FILE COPY

SUPREME CO
FILE
JUL 3
MICHAEL ROD

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-51-1

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,

Plaintiff-Respondent,

v.

YELLOWSTONE PARK LINES, INC., a corporation,
and YELLOWSTONE PARK COMPANY, a corporation,

Defendants-Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

LOVEJOY, WASSON, LUNDGREN & ASHTON
250 Park Avenue
New York, New York 10017
Attorneys for Petitioners

DOUGLAS FOSTER
of Counsel

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes Involved 3

Statement of the Case 4

REASONS FOR GRANTING THE WRIT 7

A. With respect to Question 1 above, there are two basic reasons why this Court should grant this Petition for a Writ of Certiorari—(1) conflict in the Circuits and (2) novel question 7

1. Conflict in the Circuits 7

2. Novel Question 16

B. With respect to Question 2 above, this Court should grant this Petition for a Writ of Certiorari as it presents a novel question 18

1. Novel Question 18

CONCLUSION 21

APPENDICES:

A. Judgment of the District Court a1

B. Special Findings of Fact of the District Court b1

C. Opinion of the United States Court of Appeals c1

D. Other Statutes Involved d1

CITATIONS

PAGE

Cases:

Brewer's Inc. v. *Wirtz*, 375 F.2d 911 (5th Cir. 1967) 19

Fred Wolferman, Inc. v. *Gustafson*, 169 F.2d 759 (8th Cir. 1948) 12

Hodgson v. *Texas City Dike & Marine, Inc.*, 1973 CCH Labor Law Reporter (Federal Wages-Hours), ¶32,882 (S.D. Tex. Feb. 7, 1973) 16

McComb v. *W. E. Wright Co.*, 168 F.2d 40 (6th Cir. 1948) 12

McComb v. *Wyandotte Furniture Co.*, 169 F.2d 766 (8th Cir. 1948) 12

Mitchell v. *Bekins Van & Storage Co.*, 352 U.S. 1027 (1957) 13, 14

Mitchell v. *Sunshine Department Stores, Inc.*, 292 F.2d 645 (5th Cir. 1961) 13

Phillips Co. v. *Walling*, 324 U.S. 490 (1945) 13, 14

Shultz v. *Adair's Cafeterias, Inc.*, 420 F.2d 390 (10th Cir. 1969) 11

Shultz v. *Hasam Realty Corp.*, 316 F. Supp. 1136 (S.D. Fla. 1970), *aff'd*, 442 F.2d 1336 (5th Cir. 1971) 7, 8, 9, 11, 12, 15

Walling v. *Goldblatt Bros.*, 152 F.2d 475 (7th Cir. 1945) 12

PAGE

tatutes:

Fair Labor Standards Act:

Sec. 1, 29 U.S.C. §201 2
Sec. 3(r), 29 U.S.C. §203(r) 8
Sec. 6, 29 U.S.C. §206 4
Sec. 7, 29 U.S.C. §207 4
Sec. 13(a)(2), 29 U.S.C. §213(a)(2) 7, 13, 14, 21
Sec. 13(a)(3), 29 U.S.C. §213(a)(3) 2, 3, 4, 6, 8, 13, 14, 16, 17, 18, 19, 21
Sec. 13(b)(8), 29 U.S.C. §213(b)(8) 8, 14, 16, 17, 21
Sec. 17, 29 U.S.C. §217 4

Judicial Code:

28 U.S.C. §1254(1) 2

ongressional Material:

112 CONG. REC. 20593 (1965) 15
112 CONG. REC. 20595 (1965) 15
Hearing on S. 1986 Before the Comm. for Labor & Public Welfare, 89th Cong., 1st Sess., pt. 2, at 935 (1965) 15
H.R. 871 (to accompany H.R. 10518), 89th Cong., 1st Sess., at 86 (1965) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,

Plaintiff-Respondent,

v.

YELLOWSTONE PARK LINES, INC., a corporation,
and YELLOWSTONE PARK COMPANY, a corporation,

Defendants-Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in *Peter J. Brennan, Secretary of Labor, United States Department of Labor* v. *Yellowstone Park Lines, Inc. and Yellowstone Park Company,* No. 72-1591, entered May 10, 1973.

Opinions Below

On May 22, 1972, the United States District Court for the District of Wyoming (Kerr, D.J.) granted the motion of defendants Yellowstone Park Lines, Inc. and Yellowstone

Park Company for summary judgment and ordered the Secretary of Labor's complaint dismissed with prejudice on the ground that 29 U.S.C. §213(a)(3)* exempts the defendants from the minimum wage and overtime provisions of the Fair Labor Standards Act as amended, 29 U.S.C. §201 *et seq.* Judge Kerr's order is not generally reported and appears in Appendix A hereto at pp. a1-a2. Judge Kerr's Special Findings of Fact in Support of Summary Judgment are not generally reported and appear in Appendix B hereto at pp. b1-b10. On May 10, 1973, the United States Court of Appeals for the Tenth Circuit reversed the District Court in an opinion not yet generally reported (it is reported in 1973 CCH Labor Law Reporter (Federal Wages-Hours), Para. 32,900) which appears in Appendix C hereto at pp. c1-c11.

Jurisdiction

The judgment of the Court of Appeals was entered on May 10, 1973. On June 4, 1973 an Order was entered by the Court of Appeals granting to the defendants a stay of the mandate until July 5, 1973, pending defendants' filing a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Are the integrated facilities operated within the borders of a national park on a seasonal basis by a concessioner of the United States Department of the Interior

* This is Section 13(a)(3) of the Fair Labor Standards Act and is codified under Title 29 of the United States Code as Section 213(a)(3). It will be referred to hereinafter as Section 213(a)(3) and all other Sections of the Fair Labor Standards Act hereinafter mentioned shall be referred to by their codified designations.

for the sole purpose of serving and accommodating the visitors to the park an "establishment" within the meaning and for the purposes of Section 213(a)(3) of the Fair Labor Standards Act?

2. Are employees who perform services for more than one recreational establishment exempt under Section 213 (a)(3) from the minimum wage and overtime provisions of the Fair Labor Standards Act?

The District Court answered the first question in the affirmative and therefore did not reach the second question, while the Court of Appeals explicitly answered the first question in the negative and implicitly answered the second question in the negative.

Statutes Involved

The statutory provision involved is Section 213(a)(3) of the Fair Labor Standards Act which reads as follows:

"§*213. Exemptions*

(a) The provisions of section 206 . . . and section 207 of this title shall not apply with respect to—

* * * * *

(3) any employee employed by an establishment which is an amusement or recreational establishment, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33⅓ per centum of its average receipts for the other six months of such year; . . ."

The other provisions of the Fair Labor Standards Act which are cited and discussed in this Petition are set forth in Appendix D hereto at p. d1.

Statement of the Case

The Secretary of Labor (hereinafter "the Secretary") brought this action in accordance with Section 217 of the Fair Labor Standards Act (hereinafter "the Act") to enjoin Yellowstone Park Company and Yellowstone Park Lines, Inc. (hereinafter collectively referred to as "Yellowstone" or "the Company") from violating the minimum wage and overtime provisions (Sections 206 and 207, respectively) of the Act. Yellowstone denied that it was violating the Act, claiming an exemption from the minimum wage and overtime provisions of the Act under Section 213(a)(3).

Yellowstone operates facilities and accommodations, such as hotels, inns and cabins, within Yellowstone National Park as a concessioner under the terms and conditions of an agreement with the United States Department of the Interior, National Park Service (Sp. F. 11).* The Agreement provides that Yellowstone must operate these facilities and accommodations in a manner that is satisfactory to the Government (Sp. F. 12). It also provides that all rates and prices charged to the public by Yellowstone are subject to Government regulation and approval (Sp. F. 12).

---

* Sp. F refers to the Special Findings of Fact made by the District Court which appear in Appendix B hereto.

The Yellowstone facilities are centrally managed and operated and are located at the major scenic places and tourist attractions in the Park, namely Old Faithful Geyser, Mammoth Hot Springs, Yellowstone Lake and the Grand Canyon of Yellowstone (Sp. F. 13). Those at Old Faithful, for example, consist of Old Faithful Inn, Old Faithful Lodge and Old Faithful Campers Cabins (Sp. F. 15). Those at Yellowstone Lake consist of Lake Hotel, Lake Lodge and Lake Hotel Cabins. Each facility offers a variety of accommodations to meet the needs and requests of the public.

Yellowstone employs mostly college students during its season and they are all employed under the terms and conditions of the same Employee Work Agreement (Sp. F. 19). They are hired and assigned to jobs according to the needs of Yellowstone. They are not hired for a specific facility. Employees may be, and frequently are, transferred from one facility to another during the season, according to Yellowstone's needs (Sp. F. 19 and Sp. F. 20). They all serve the millions of visitors to the Park, whether as waiters, maids, reservations clerks, bellboys or laundry workers.

The Secretary contended that Yellowstone's facilities were physically separate and each one therefore constituted a single establishment. On the basis thereof the Secretary contended that two groups of Yellowstone's employees were not exempt, namely (1) those employees employed by Yellowstone who work at more than one facility and (2) those employees employed by Yellowstone who work at one facility but whose work benefits more than one facility. Yellowstone contended that all of its facilities in Yellowstone Park constituted a single establishment be-

cause they all have the same purpose, namely to serve and accommodate the people who visit the Park, and are functionally integrated with central management, central accounting and bookkeeping, central hiring and interchange of employees.*

The parties stipulated to the facts and further stipulated as to their respective contentions with respect to Yellowstone's employees and the general nature of the issue to be presented to the District Court.

On March 8, 1972, Yellowstone moved for summary judgment in the United States District Court for the District of Wyoming and on April 14, 1972 the Secretary cross-moved for summary judgment. On May 22, 1972 the District Court granted Yellowstone's motion on the basis of twenty-nine Special Findings of Fact which supported the court's judgment that Yellowstone was an amusement or recreational establishment within the meaning of Section 213(a)(3) and entered an order granting Yellowstone's motion for summary judgment and dismissing the Secretary's complaint with prejudice.

The Secretary appealed from the District Court's order and the appeal was argued before the United States Court of Appeals for the Tenth Circuit on March 29, 1973. On May 10, 1973, judgment was entered by the Court of Appeals, reversing the District Court's judgment and remanding the cause for entry of an injunction. Yellowstone thereupon made application to the Court of Appeals for a stay of that Court's mandate and on June 4, 1973, the Court of Appeals granted Yellowstone's application.

---

* Yellowstone asserted that it met both seasonal tests of Section 213(a)(3) and the Secretary never contended that it did not.

Reasons for Granting the Writ

A. ***With respect to Question 1 above, there are two basic reasons why this Court should grant this Petition for a Writ of Certiorari—(1) conflict in the Circuits and (2) novel question.***

1. Conflict in the Circuits

There are a number of important exemptions to the minimum wage and overtime provisions of the Act. Several of these exemptions use the word "establishment" and the determining factor in the application of these exemptions is how that word is interpreted. "Establishment" and "recreational establishment" are nowhere defined in the Act.

There are only two reported cases in which the word "establishment" has been interpreted by the courts in connection with the exemptions other than the "retail establishment" exemption contained in Section 213(a)(2). In the one, *Shultz* v. *Hasam Realty Corp.*, 316 F. Supp. 1136 (S.D. Fla. 1970), *aff'd* on the basis of the opinion of the District Court, 442 F.2d 1336 (5th Cir. 1971), the Fifth Circuit interpreted "establishment" to include several facilities which were physically separated but which were functionally integrated with central management, central bookkeeping, central hiring, and with interchange of employees, whereas in this case the Tenth Circuit interpreted "establishment" not to include several facilities which were similarly functionally integrated but which were also physically separated.

There is, therefore, a clear conflict between the Tenth and Fifth Circuits concerning the meaning of the word "establishment" in connection with exemptions to the Act.

The parties to this action stipulated below that Yellowstone's operations in Yellowstone National Park were an enterprise* within the meaning of the Act and were therefore subject to the Act. Yellowstone contended that its several facilities constituted a single establishment and thus were exempt under Section 213(a)(3), whereas the Secretary contended that each of the facilities constituted a single establishment and therefore certain employees were not exempt. The Tenth Circuit held, in reversing the District Court, that each of Yellowstone's facilities was a single establishment.

The question before the Fifth Circuit in *Hasam* was whether defendants' hotel complex, stipulated by the parties to be an enterprise within the meaning of the Act, was also a single establishment, as defendants contended, or whether it was five separate establishments, as the term "establishment" is used in Section 213(b)(8), as the Secretary of Labor contended. The Fifth Circuit held that the hotel complex, although composed of five separate facilities, two of which were located in one Florida city and two in another with the fifth in a different county from the other four, was a single hotel establishment within the meaning of Section 213(b)(8).

In *Hasam,* as in this case, the Secretary contended that the exemption sought was unavailable as to those employees who perform what the Secretary calls "central office operations" for the entire complex or group of facilities, as opposed to those employees who work in and for one of the individual facilities or "establishments."

---

* Enterprise, unlike establishment, is defined in the Act in Section 203(r).

The categories of employees whom the Secretary contended were not exempt from the provisions of the Act in each case are strikingly similar. In *Hasar* the Secretary contended that the following categories of employees, among others, were not exempt from the provisions of the Act on the basis that their work involved or benefited more than one facility:

(1) Central accounting office employees

(2) Executive office employees

(3) Reservations office employees

(4) Public relations office employees

(5) Laundry employees

(6) Print shop employees

(7) Central maintenance and repair employees who take care of maintenance and repairs on all the hotel's facilities and properties.

In this case, the Secretary contended that the following categories of employees, among others, were not exempt from the provisions of the Act on the aforesaid basis that their work involved or benefited more than one of Yellowstone's facilities:

(1) Central accounting office employees

(2) Manager's office employees

(3) Reservations office employees

(4) Advertising and promotion office employees

(5) Laundry employees

(6) Print shop employees

(7) Central maintenance and repair workers who perform functions which serve several or all of the company's establishments in the Park.

Because the Fifth Circuit held that all of the hotel's facilities constituted a single establishment, that court found that the aforesaid employees were employed by a single establishment and were therefore exempt, contrary to the Secretary's contention. In this case, however, because the Tenth Circuit held that Yellowstone's operations consisted of several establishments, the Tenth Circuit found that the aforesaid employees were not exempt in accord with the Secretary's contention that they were "central office employees."

In determining that the five separate facilities of the hotel complex constituted a single establishment, the Fifth Circuit stressed that the hotel was "a single, cohesive unit" with common ownership and a common payroll. It also stressed that (1) no separate records were maintained by each of the five facilities but rather that the general accounting department maintained payroll, financial and accounting records for all of the facilities; (2) the hiring for all five facilities was done through a central office; (3) the employees were not hired to work solely in one of the five facilities and the employees were often interchanged between the various hotel facilities, according to the needs of the hotel.

In this case, although the District Court found that (1) all of the facilities operated by Yellowstone are centrally managed (Sp. F. 16); (2) all the books and records for the facilities are maintained and prepared by the cen-

tral accounting office and no separate books and records are kept for the individual facilities (Sp. F. 17); (3) all employees who work in the various facilities are hired by Yellowstone to work for the Company (Sp. F. 19), are employed under the terms and conditions of the same Employee Work Agreement (Sp. F. 19), are assigned to specific jobs by the Company according to its needs (Sp. F. 19) and are often transferred by the Company from one facility to another according to the needs of the Company (Sp. F. 20), the Tenth Circuit nevertheless held that Yellowstone's facilities do not constitute a single establishment.

Therefore, although the District Court in *Hasam* and the District Court in this case found the same facts with respect to the functionally integrated operation of the respective facilities, we find that in *Hasam* the Fifth Circuit held that the several physically separate facilities constituted a single establishment while in this case the Tenth Circuit held that the several physically separate facilities did not constitute a single establishment.

The essential difference between the Fifth Circuit's test of an "establishment" and the Tenth Circuit's test is that the Tenth Circuit applied as its sole criterion in determining what constitutes an "establishment" one of physical distance or geographic separation* whereas the Fifth Cir-

---

* It applied this as its sole criterion despite the fact that in *Shultz* v. *Adair's Cafeterias, Inc.*, 420 F.2d 390 (10th Cir. 1969), a case relied upon by the Tenth Circuit in this case, that court applied the so-called "public access" test which asks the question does the public have access to the particular facility and does the facility serve and accommodate the public. In *Adair's*, the Tenth Circuit stated (at p. 395): "[T]he public was not invited nor allowed to purchase from the bakery" and therefore the bakery was not a "retail establishment." The Tenth Circuit, however,

cuit applied a broader test which included not only physical separation but also functional and employee separation or integration. The Tenth Circuit determined that the facilities of Yellowstone consisted of more than one establishment *solely* because there was physical distance between the various facilities, without considering that they operate as a functionally integrated unit. The Fifth Circuit, on the other hand, applied the functional test and decided that although there was physical separation between the various hotel facilities, nevertheless, they did constitute a single establishment because they operated as a functionally integrated unit.

The Tenth Circuit is also in conflict with the Sixth, Seventh and Eighth Circuits when it applies physical separation as the sole test to determine the meaning of the word "establishment" as used in various exemptions to the Act. Those Circuits, like the Fifth Circuit in *Hasam*, have applied a functional test as the primary test to determine the meaning of "establishment". In applying that test they have found certain facilities not exempt because they were functionally separate even though physically united with exempt facilities. See *McComb* v. *W. E. Wright Co.*, 168 F.2d 40 (6th Cir. 1948); *Walling* v. *Goldblatt Bros.*, 152 F.2d 475 (7th Cir. 1945); *Fred Wolferman, Inc.* v. *Gustafson*, 169 F.2d 759 (8th Cir. 1948); and *McComb* v. *Wyandotte Furniture Co.*, 169 F.2d 766 (8th Cir. 1948). While these cases all denied claimed exemptions, they did make clear that physical proximity is not the criterion for defin-

---

failed to use this "public access" test in this case. If it had, it would clearly have found that all Yellowstone facilities are open to the public and indeed exist only to serve and accommodate the public.

ing an establishment. See also another Fifth Circuit case, *Mitchell* v. *Sunshine Department Stores, Inc.*, 292 F.2d 645 (5th Cir. 1961).

In applying the physical separation test as the only test in determining what is an "establishment", the Tenth Circuit relied on this Court's decision in *Phillips Co.* v. *Walling*, 324 U.S. 490 (1945), wherein this Court held that a centralized warehouse, which serviced defendants' 49 retail grocery stores, was not a "retail establishment" within the meaning of Section 213(a)(2). The *Phillips* decision considered the term "retail establishment" in connection with an exemption provided for in Section 213(a)(2), not the term "recreational establishment" under Section 213 (a)(3). The Tenth Circuit acknowledged that "[M]uch of the law which deals with the retail establishment exemption is concerned with the difference between retail and wholesale activities". This is certainly true with respect to *Phillips* where, despite the dictum that an "establishment" is a distinct physical place of business,* this Court in fact *decided* that the facility in issue in *Phillips* was not entitled to an exemption, primarily because as a warehouse it was *functionally* separate from the other facilities. Thus, the Tenth Circuit relied only on dictum from *Phillips*, not its reasoning and not its holding.

The Fifth Circuit in *Hasam*, on the other hand, found the *Phillips* case and the other cases, such as *Mitchell* v. *Bekins Van & Storage Company*, 352 U.S. 1027 (1957),

---

* Petitioners contended below that Yellowstone National Park was a distinct physical place of business for the purposes of the Act. It should be noted that the concession granted to Yellowstone covers the entire Park in a single agreement between Yellowstone and the National Park Service (see p. 4, *supra*).

which interpreted Section 213(a)(2) and "retail establishment" to determine the availability of that exemption to a warehouse, not persuasive with respect to a definition of "establishment" in the context of Section 213(b)(8). "This Court is simply unable to see any strong similarity between . . . a central warehouse servicing a vast chain of grocery stores and the Diplomat Hotel" (316 F. Supp. 1136 at p. 1143). Petitioners are unable to see any similarity between a central warehouse servicing a vast chain of grocery stores and their operations, which, we maintain, are very similar to the Diplomat Hotel operations.

Moreover, the Tenth Circuit's reliance upon *Phillips* is more pointedly misplaced when we consider the purposes for which Congress passed Sections 213(a)(2) and 213(a)(3), respectively. Congress adopted Section 213(a)(2) to protect the local grocery stores (the so-called "Mom and Pop" stores) from the competition of the large chain stores and to protect the independent wholesaler who would be at a competitive disadvantage if the large chain store could obtain an exemption for its wholesale operation. The rationale of *Phillips* and *Bekins Van & Storage* is that a chain store system which combines wholesale and retail elements into a single operation must not be allowed to have the wholesale element gain the exemption Congress meant only for the retail business. It is clear that there is no wholesale aspect to the Yellowstone operations, which exist solely to serve and accommodate the public.

Section 213(a)(3), however, was adopted by Congress for completely different purposes and therefore the word "establishment" in this Section should be interpreted to carry out these purposes. Congress passed the "recrea-

tional establishment" exemption in 1966 essentially for two purposes—(1) to protect domestic recreational facilities and operations from foreign competition and (2) to afford our young people an opportunity to obtain summer jobs.* Both of these purposes are defeated if the facilities operated by Yellowstone in Yellowstone National Park and similar facilities operated in the other national parks are excluded from the exemption, even though they meet the prescribed seasonal tests. Yet, this is precisely the result if the "recreational establishment" exemption is interpreted as it was by the Tenth Circuit in this case. In this interpretation, the exemption would apply only to those recreational operations which consist of one facility or building, or, at the most, a few buildings which are contiguous and thus meet the physical separation test. Because many recreational operations, including those at issue in both this case and *Hasam,* consist of several physically separate facilities, the exemption would have little application if the Tenth Circuit's position is allowed to stand.

We recognize, as the Tenth Circuit pointed out in its opinion, that the coverage provisions of the Act are normally broadly construed and the exemptions are narrowly construed so as to carry out the basic purpose of the Act which is to protect the working man and woman and insure that they are able to maintain a decent standard of living. This basic purpose, however, is not contravened by the construction which the petitioners contend should be given

* For the limited legislative history on this point, see 112 Cong. Rec. 20593 and 20595, Hearing on S. 1986 Before the Comm. for Labor & Public Welfare, 89th Cong., 1st Sess., pt. 2 at 935 (1965) and H.R. 871 (to accompany H.R. 10518) 89th Cong., 1st Sess. 86 (1965).

to Section 213(a)(3). On the contrary, the Tenth Circuit's interpretation of that Section would defeat its purposes by pricing many young unskilled college students out of the labor market and by placing this country's recreational operations at a competitive disadvantage with their foreign counterparts.

For the foregoing reasons this Court should clarify the meaning of "establishment" * as used in the several exemptions in the Act which were adopted for different reasons and at different times and should enunciate what tests should be applied by the lower courts in deciding whether a business operation consisting of more than one facility is an "establishment".

2. Novel Question

Section 213(a)(3) of the Act is the controlling statute for all seasonal recreational or amusement operations in the country. Its application will have substantial effect upon those operations, upon their hiring policies, upon their operating costs and upon the rates they will charge. This Court has never interpreted Section 213(a)(3) nor, indeed, Section 213(b)(8). These Sections provide exemptions for all seasonal amusement or recreational establishments and all hotel and motel establishments. It is most

* The need to clarify the meaning of "establishment" in the context of Section 213(a)(3) becomes strikingly obvious in light of *Hodgson* v. *Texas City Dike and Marine, Inc.*, 1973 CCH Labor Law Reporter (Federal Wages-Hours), Para. 32,882 (S.D. Tex. Feb. 7, 1973), in which the Court observed that the Administrator, Wage, Hour and Public Contracts Division of the Department of Labor, has issued an opinion that "national parks establishments" are exempt from the Act by reason of Section 213(a)(3) and the Court relied on the analogy between "national parks establishments" and defendant's operations in granting an exemption to defendant.

important to define "establishment" in the context of the recreational establishment and the hotel establishment exemptions and to clarify what test or tests should be applied in deciding whether two or more facilities constitute an "establishment".

If the word "establishment", as used in Section 213(a)(3) and in Section 213(b)(8), is defined as narrowly as the Tenth Circuit defined it in this case, most recreational or amusement operations and indeed many hotels will be adversely affected because most such operations consist of several physically separated facilities or buildings. Thus, if physical separation is the sole test, as the Tenth Circuit held, most recreational operations in the United States will be excluded from the "recreational establishment" exemption which was in fact adopted to give these recreational operations the opportunity to compete with similar foreign operations and to hire a number of unskilled young people. Instead, these recreational operations, including not only those located at our national parks but also those located elsewhere throughout our country, will be impelled to reduce their staffs and raise their rates,* both contrary to the purposes of Congress in enacting Section 213(a)(3).

Moreover, if the Tenth Circuit is correct (and we vigorously contend that it is not) that physical separation is the sole test to be applied in determining the meaning of "establishment", it is respectfully submitted that this Court should spell out more precisely what physical separation means, other than the vague "distinct physical place of business" phrase which was relied on by the Tenth Circuit.

---

* An increase in rates could well have an adverse effect upon this country's serious balance of payments problem, for our national park facilities and other resorts will be less attractive to foreign tourists.

B. *With respect to Question 2 above, this Court should grant this Petition for a Writ of Certiorari as it presents a novel question.*

1. Novel Question

Section 213(a)(3) exempts "any employee employed by an amusement or recreational establishment" from the provisions of the Act. If each of the Yellowstone facilities is considered a separate establishment, as the Tenth Circuit held, nevertheless any employee working at one of the facilities is exempt, even though his work may benefit one or more of the other facilities, because *each* such facility is a recreational establishment* that indisputably meets the statutory seasonal tests and because Section 213(a)(3) exempts "*any employee* employed by an amusement or recreational establishment."

The exemption applies to "any employee" of a recreational establishment. It does not qualify who is exempt by the duties he performs. It does not say "any employee" except those whose work benefits another recreational establishment. Under the Secretary's construction, however, which the Tenth Circuit adopted, certain employees are not exempt because their duties are such that they benefit more than one facility. Is it not an artificial distinction to say that the reservations clerks located at Mammoth Lodge and the waiters or busboys who work there, all of whom are unskilled college students hired by Yellowstone for the summer under the same employee work agreement and assigned and reassigned according to the Company's

* The Tenth Circuit in its opinion (see p. c10 of Appendix C) stated that "the employees exempted are those who are employed by an exempt establishment." Thus, the Tenth Circuit implicitly found that each of Yellowstone's facilities constituted an exempt recreational establishment.

needs, are governed by different salary regulations? Or, to say that certain maintenance employees are not exempt just because they serve several of Yellowstone's facilities whereas the other maintenance employees are exempt?

In its opinion (see pp. c10 and c11 of Appendix C), the Tenth Circuit refers to a letter from the Secretary wherein the Secretary conceded that all of Yellowstone's employees, including maids, were exempt under Section 213(a)(3), except for "central employees who perform functions which serve several, or all, of the company's establishments. . . . " Certain job categories that the Secretary considered not to be exempt are then listed, but this list does not include maids, for example, who work at more than one facility. It would appear that the Secretary concedes that maids, even those who work at more than one facility, are exempt. This must be on the basis that these employees are employed by two or more exempt recreational establishments (obviously not on the basis that all of Yellowstone's facilities constitute a single establishment) and are thereby exempt.

The only apparent difference between a maid who is exempt and a laundry worker, for example, who, the Secretary contends, is not exempt is that the former employee is physically present in the several facilities where she performs her duties while the latter employee performs her duties in one facility although her work benefits several other facilities. To decide whether an employee is exempt or not on such an artificial distinction is illogical.

The Fifth Circuit faced this question in the "retail establishment" context in *Brewer's Inc.* v. *Wirtz,* 375 F.2d 911 (5th Cir. 1967). In that case the District Court had deter-

mined that certain employees were not exempt because they were employed by two separate retail establishments. The Fifth Circuit reversed and stated (p. 914):

> "* * * The holding of the court below that the employees, although employed by two retail establishments, are not within the exemption because they are not employed by a single retail establishment is clearly unsupportable. The plain words of the statute do not restrict the exemption to employees employed by only one retail establishment, and no authority has been found favoring such a restriction. The exemption applies to any employee of any retail establishment. We see no reason why a retail establishment whose employees are otherwise exempt should lose the exemption for any employee whom it permits to perform work for another retail establishment as long as the employees are working for retail establishments, and the Secretary does not press upon us any reason for making such a distinction."

This Court should resolve the novel question whether employees of a single facility that qualifies as an exempt establishment, whether retail, recreational or hotel, are also exempt when their duties require them to provide services for other similar facilities that are likewise exempt establishments.

CONCLUSION

This Petition for a Writ of Certiorari should be granted to resolve the conflict between the Fifth and Tenth Circuits concerning the meaning of "establishment" as used in the exemptions from the minimum wage and overtime provisions of the Fair Labor Standards Act, to resolve the conflict between the Fifth, Sixth, Seventh and Eighth Circuits and the Tenth Circuit concerning the test or tests to be applied in determining the meaning of "establishment," to clarify this Court's position concerning what test or tests should be applied and to answer the novel questions concerning the meaning and application of Sections 213(a)(3) and 213(b)(8), as well as 213(a)(2), of the Act.

Respectfully submitted,

LOVEJOY, WASSON, LUNDGREN & ASHTON
250 Park Avenue
New York, New York 10017
Attorneys for Petitioners

DOUGLAS FOSTER
of Counsel

APPENDIX A

Judgment of the District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

No. 5569 Civil

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,

Plaintiff,

vs.

YELLOWSTONE PARK LINES, INC., a corporation,
and YELLOWSTONE PARK COMPANY, a corporation,

Defendants.

SUMMARY JUDGMENT

The above entitled matter having come on regularly for hearing before the Court upon the motion for summary judgment filed by the defendants and the cross-motion for summary judgment filed by the plaintiff herein, the defendants appearing by and through Lawrence A. Yonkee of the firm of Redle, Yonkee and Arney, and Douglas Foster of the firm of Lovejoy, Wasson, Lundgren and Ashton, and the plaintiff appearing by and through Tosh Suyematsu, Assistant United States Attorney for the District of Wyoming, and Roger L. Rutter and Ron Whiting, Attorneys, United States Department of Labor, and the Court having

heard the arguments of counsel took said matter under advisement. After considering the pleadings, the interrogatories and answers thereto, the affidavits filed herein and exhibits attached thereto, the request for admissions and the stipulation filed by the parties herein wherein each of the parties agreed there is no dispute as to any genuine issue of fact, and now being fully advised in the premises, the Court finds that 29 U.S.C. Section 213(a)(3) exempts the defendants from the minimum wage and overtime provisions of said Act, and the Court having prepared and filed simultaneously herewith its special findings, though not required to do so by Rule 56 of the Federal Rules of Civil Procedure, it is

ORDERED that the motion for summary judgment of the defendants, Yellowstone Park Lines, Inc., a corporation, and Yellowstone Park Company, a corporation, be, and the same is hereby, sustained.

IT IS FURTHER ORDERED that the complaint of the plaintiff be, and the same is hereby, dismissed with prejudice, the parties to pay their own costs.

Dated this 22nd day of May, 1972.

EWING T. KERR
Judge.

APPENDIX B

Special Findings of Fact of the District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

No. 5569 Civil

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,

Plaintiff,

vs.

YELLOWSTONE PARK LINES, INC., a corporation, and
YELLOWSTONE PARK COMPANY, a corporation,

Defendants.

SPECIAL FINDINGS OF FACT IN SUPPORT
OF SUMMARY JUDGMENT

1. The Court has jurisdiction in this matter pursuant to Section 17 of the Fair Labor Standards Act, 29 U.S.C. §217, and pursuant to 28 U.S.C. §§1337 and 1345.

2. Yellowstone Park Company was organized on June 6, 1936, under the laws of Delaware and is and has been a Delaware corporation from that date to the present.

3. Yellowstone Park Company is a wholly-owned subsidiary of General Host Corporation.

4. General Host Corporation is a New York corporation with its principal place of business at 245 Park Avenue, New York, New York.

5. Yellowstone Park Lines is a wholly-owned subsidiary of Yellowstone Park Company.

6. The employees of Yellowstone Park Company are engaged in commerce within the meaning of the Fair Labor Standards Act.

7. The business activities of Yellowstone Park Company and Yellowstone Park Lines are related and performed through unified operation or common control for a common business purpose and constitute an enterprise within the meaning of Section 3(r) of the Fair Labor Standards Act, 29 U.S.C. §203(r).

8. Yellowstone Park Company had annual gross volume from sales made or business done during the period from February 1, 1967, through January 31, 1969, of not less than $500,000.00 (exclusive of excise taxes at the retail level which are separately stated). Every year since February 1, 1969, Yellowstone Park Company had annual gross volume from sales made or business done of not less than $250,000.00 (exclusive of excise taxes at the retail level which are separately stated). 29 U.S.C. 203(s)(1).

9. The controlling provision of the Fair Labor Standards Act in this action is Section 13(a)(3), 29 U.S.C. §213 (a)(3). If Yellowstone Park Company qualifies as an

amusement or recreational establishment within the meaning and for the purpose of that section, the Company is exempt from Sections 6 and 7 of the Act, 29 U.S.C. §§206 and 207, pertaining to minimum wages and maximum hours.

10. Yellowstone Park was established by an Act of Congress dated March 1, 1872. This act was entitled: "An Act to set apart a certain Tract of Land lying near the Head Waters of the Yellowstone River as a public Park". Yellowstone Park Company operates exclusively within the geographic boundaries of Yellowstone Park and exclusively upon the tract of land set apart by the Congress as Yellowstone Park.

11. Yellowstone Park Company operates as a concessioner within Yellowstone National Park under the terms and conditions of an agreement between Yellowstone Park Company and the United States Department of the Interior, National Park Service. The first such agreement was entered into in 1936. On August 8, 1966, a new agreement was executed. This agreement is for a term of 30 years and expires on September 30, 1996. This agreement covers all of the Company's facilities within the Park.

12. The agreement between Yellowstone Park Company and the National Park Service provides that all rates and prices charged to the public by the Company are subject to Government regulation and approval. The agreement further provides that the Company must pay a franchise fee to the Government equal to 1½% of its gross receipts.

In accordance with the terms of the agreement, the Company is required to spend $10,000,000 by June 1975 in construction of new facilities and renovation of existing facilities. This expenditure must be made in accordance with plans approved by the Secretary of the Interior. Under the agreement, all accommodations and facilities operated by the Company must be operated in a manner that is satisfactory to the Government.

13. Yellowstone Park Company was formed and exists today to accommodate and service the needs of the thousands of people who visit the Park each year. In connection therewith, the Company maintains facilities for the public throughout the Park. These facilities include hotels, inns, lodges and cabins located at specifically designated places in the Park, such as Old Faithful, Mammoth, Lake, Canyon Village, Fishing Bridge and Roosevelt.

14. During the 5½ month period from May 16 to October 30, 1971, Yellowstone Park Company had $6,442,463 in sales, amounting to approximately 98% of the total sales realized by the Company during 1971. The Company thereby meets the seasonal test set forth in Section 13(a)(3)(B) of the Fair Labor Standards Act, 29 U.S.C. §213(a)(3)(B).

15. The facilities of Yellowstone Park Company were opened during 1971 in accordance with the following schedule:

Open	*Location*	*Close*
May 7	Old Faithful Campers Cabins	Oct. 11
May 14	Mammoth Motor Inn	Oct. 8
May 20	Lake Lodge	Sept. 23
May 22	Old Faithful Inn	Sept. 25
May 24	Mammoth Inn Cabins	Sept. 7
June 1	Fishing Bridge Trailer Village	Sept. 21
June 4	Lake Hotel	Aug. 30
June 4	Canyon Village Motor Lodge	Sept. 7
June 11	Old Faithful Lodge	Sept. 7
June 11	Fishing Bridge Cabins	Aug. 27
June 12	Roosevelt Lodge	Aug. 30
June 18	Lake Hotel Cabins	Aug. 30

The Company thereby meets the seasonal test set forth in Section 13(a)(3)(A) of the Fair Labor Standards Act, 29 U. S. C. §213(a)(3)(A).

16. Yellowstone Park Company is managed on a day-to-day basis by Mr. John Amerman, Executive Vice President and General Manager, Mr. Robert Boyd, Vice President-Finance and Controller, and the several department directors, such as the director of marketing and sales, the director of food and beverage and the director of lodging. Each facility is under their direct supervision and management. They determine the date when each facility shall be opened and closed, the rates and prices each will charge, the or-

ganization of each and the manner and policy under which each will operate, the salary of each employee, and the hiring, firing, assignment and transfer of all employees, subject only to the provisions of the agreement between the Company and the National Park Service and the general supervision of the parent, General Host Corporation.

17. Yellowstone Park Company maintains a central accounting office within Yellowstone Park. The central accounting office is under the management of Robert Boyd. The duties of the employees of that office are to perform all accounting and payroll functions for all locations and facilities operated by the Company. That office maintains all of the books and records for all of the facilities and operations of the Company. Those books and records consist of the following:

1. All Sales journals.
2. General Ledger.
3. All Payroll Records.
4. Accounts Payable and Accounts Receivable Records.
5. All Bank Records.
6. Files on Customer Prepaid Reservations, Room Folios, Food Checks.
7. Records on Inventories of Merchandise and Fixed Assets for All Operations.

They are maintained in the first instance on the basis of departments, such as room sales, food sales and beverage

sales. No separate books and records are kept for the individual facilities.

18. In 1971, a total of 2289 people, mostly college students, were employed by Yellowstone Park Company. With the exception of a skeleton staff of less than 50 employees who work during the winter months, all of the employees employed by the Company only work during all or part of the summer season. So many college students apply for summer positions that the Company can only hire approximately one out of seven applicants, even though the Company states in its "Information Circular For Prospective Employees of the Yellowstone Park Company" that if it is necessary for the employee to earn the entire cost of his next year's schooling, the Company offers few positions that accomplish this purpose.

19. All employees are hired by Yellowstone Park Company to work for the Company, and they are assigned by the Company to specific jobs and departments according to the needs of the Company. Each employee is employed under the terms and conditions of an Employee Work Agreement between the Company and the individual employee. Among the jobs which are filled each summer according to the Company's needs are those of location manager, front office manager and location controller for each of the Company's facilities. The employees who fill these positions are hired only for the particular summer season. They are not part of the management team that runs the Company's operations and determines its policy. The location controller is responsible to the general accounting office, not to the lo-

cation manager. The location and front office managers are responsible to Mr. John Amerman and the manager's office. They cannot hire, fire, transfer or reassign any of the other employees of the Company, although they are hired and can be fired, transferred or reassigned by central management. They do not determine the hours that any of the Company's other employees shall work. This is determined and scheduled by central management.

20. During the course of the summer season, a number of employees are transferred either from one of the Yellowstone Park Company's facilities to another or from one job to another, all for the purpose of satisfying the needs of the Company. In 1971, a total of 272 employees were transferred during the summer by the Company. The Employee Work Agreement and the "Information Circular for Prospective Employees of the Yellowstone Park Company" advise the prospective employee that the Company may transfer or reassign him.

21. Each employee of Yellowstone Park Company in a particular job category is paid according to the same salary scale regardless of the facility where he works. Each employee in a specific job category is governed by the same regulations for dress, hours and conduct according to that category, irrespective of the particular facility where the employee works.

22. Each employee of Yellowstone Park Company is required to adhere to the rules and regulations of the National Park Service. Any violation of Park rules and regulations is punishable by the United States Government.

The Company will not retain any employee that the Superintendent of the National Park Service or his duly authorized representative may declare unfit for service within the Park.

23. Each employee of Yellowstone Park Company is issued a name badge in the name of Yellowstone Park Company. The name badge is uniform for all locations and facilities, except for the inclusion of the particular employee's name. This is also true with respect to the employee's identification card.

24. All employees of Yellowstone Park Company are paid by the Company. The employees' checks are prepared by the general accounting office. The Company cashes the employees' checks as a convenience to them since there is no banking facility within Yellowstone Park.

25. Overtime for any of the employees of Yellowstone Park Company may be paid only on the specific authorization of the General Manager, John Amerman, irrespective of the particular facility where the employee works.

26. Each employee's time card is issued by Yellowstone Park Company and bears the caption, "Yellowstone Park Company—Yellowstone National Park, Wyoming", irrespective of the particular facility where the employee works.

27. Each employee of Yellowstone Park Company is charged a nominal sum of $3.50 per day for meals and lodging, irrespective of the particular facility where the employee works.

28. All employees of Yellowstone Park Company are furnished with ample facilities for, and many forms of, recreation and entertainment, including dances, films, sports tournaments, talent shows, field trips, music programs and an employee newspaper.

29. Yellowstone Park Company maintains an advertising and promotion office which advertises all of the Company's facilities in Yellowstone Park by means of a brochure or booklet issued by the Company. This brochure emphasizes the many scenic wonders and other attractions of the Park, including Old Faithful geyser and the thousands of other geysers, waterfalls, canyons, mountains, forests and trout streams, plus the many animals. It urges the reader to stay inside the Park where there are accommodations for 9,000 overnight guests at hotels, cottages, and cabins and a variety of eating places from self-service counters to pleasant hotel dining rooms.

Dated this 22nd day of May, 1972.

EWING T. KERR
Judge.

APPENDIX C

Opinion of the United States Court of Appeals

[Filed May 10, 1973]

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MARCH TERM, 1973

No. 72-1591

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,

Plaintiff-Appellant,

—v.—

YELLOWSTONE PARK LINES, INC., a corporation,
and YELLOWSTONE PARK COMPANY, a corporation,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

(D.C. No. 5569)

DONALD S. SHIRE, Attorney, U. S. Department of Labor (Alfred G. Albert, Acting Solicitor of Labor, Carin Ann Clauss, Associate Solicitor, John K. Light, Attorney, U. S. Department of Labor, and Harper Barnes, Regional Solicitor, on the brief) *for Plaintiff-Appellant.*

DOUGLAS FOSTER (Lovejoy, Wasson, Lundgren & Ashton; Redle, Yonkee & Arney; Of Counsel, Lawrence A. Yonkee, on the brief) *for Defendants-Appellees.*

Before BREITENSTEIN, *Circuit Judge,* DURFEE,* *Judge, Court of Claims,* and DOYLE, *Circuit Judge.*

DOYLE, *Circuit Judge.*

This is an appeal from a judgment rendered by the United States District Court for the District of Wyoming denying the petition of the Secretary of Labor for an injunction against Yellowstone Park Lines, Inc. and Yellowstone Park Company from violating the minimum wage and record keeping requirements of the Fair Labor Standards Act. Plaintiff sought a judicial determination that the Act applied to the numerous employees of the Company who were working in Yellowstone National Park. Jurisdiction was founded upon 29 U.S.C. § 217 and 28 U.S.C. §§ 1337 and 1345. The trial court ruled that these employee relationships were exempt on the basis that all of the operations of Yellowstone Park Lines, Inc. and Yellowstone Park Company constituted a single establishment and as such were exempt under 29 U.S.C. § 213(a)(3), the employees being "employed by an establishment which is an amusement or recreational establishment." [1]

---

* Sitting by designation.

[1] 29 U.S.C. § 213 provides in part:

(a) The provisions of sections 206 and 207 of this title shall not apply with respect to—

* * *

(3) any employee employed by an establishment which is an amusement or recreational establishment, if (A) it does not operate for more than seven months in any calendar year,

Based on the geographic separation of the various enterprises, the Secretary maintained that there was not a single establishment but, rather, a number of separate and distinct establishments.

The parties agreed that if each physically separate facility or location operated by defendants constituted a single establishment, the Secretary would be entitled to an injunction for violation of the Act. On the other hand, the parties agreed that if all Company operations in Yellowstone National Park constituted a single establishment, the decision should be that the defendants are exempt.

Summary judgment motions were filed by both sides, and following arguments and factual presentations in the form of affidavits, the judgment was in favor of the defendants.

Yellowstone Park Company is a Delaware corporation which owns and operates tourist facilities in Yellowstone National Park. It has a contract with the Secretary of the Interior which was first entered into in 1936 and was renewed again in 1966 for an additional term of 30 years.

The Company's concessions include hotels, inns, lodges, cabins and restaurants. These are located at widely separated places including Mammoth, Hot Springs, Old Faithful, Yellowstone Lake and Canyon Village. The Company

---

or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33⅓ per centum of its average receipts for the other six months of such year; or

* * *

It is undisputed that defendants meet the seasonal requirements of § 213(a)(3).

facilities at Hot Springs are located some 51 miles from the facilities at Old Faithful, whereas the facilities at West Thumb near Yellowstone Lake are 68 miles from Mammoth, and the facilities at Roosevelt Lodge are 60 miles from Old Faithful, and were shown to be 56 miles from West Thumb.

Wide variations in the various areas are shown—different types of scenery and different formations including canyons and mountain streams, lakes and geysers. There are marked differences in the various areas in terms of size and individuality. The recreational facilities also vary from one area to another as do the hotel facilities.

Ordinarily employees are primarily attached to one facility, that at which they are working. They are supervised by the manager of that particular facility who has his own day to day standards. The accounting methods are set up so as to reveal whether each individual unit makes a profit.

Two classes of employees serve more than one facility. One group includes maids, maintenance personnel and boiler room operators, who work at more than one establishment. The other group is made up of those who work mainly at one facility, but performing work which benefits one other. These are employees who work in the central accounting office, manager's office, reservations, advertising and promotion, laundries, print shop, personnel office, warehouse, garage, central fire watch office and ice manufacturing plant.

The manager's office, central reservations, advertising and promotion are located in the summer at Mammoth and the rest of the year at Gardiner. These offices serve each of the Company's facilities. The laundries are op-

erated at Mammoth Lake Lodge and Old Faithful Inn and each serves several different facilities from those locations. The print shop is located at Mammoth, but serves each of the Company facilities in the Park. The personnel office, the warehouse and garage are all located in Gardiner and serve all of the Company locations and facilities.

The facilities operated by the Company are located at the major scenic places and tourist attractions in the Park, including Old Faithful Geyser, Mammoth, Hot Springs, Yellowstone Lake and the Grand Canyon of Yellowstone. At Old Faithful there are several lodges including Old Faithful Inn, Old Faithful Lodge and Old Faithful Campers Cabins. At Yellowstone Lake are the Lake Hotel, Lake Lodge and Lake Hotel Cabins. All of these facilities are advertised in one brochure. The Company also maintains buses for transporting tourists from one area to another. The various facilities have a central management which includes a number of department directors. Policy decisions are made by the management and are applicable to all of the facilities.

The statutory provision which the Company claims furnishes it an exemption is § 213(a)(3) which provides an exemption for any employee employed by an amusement or recreational establishment which meets certain seasonal tests. Undoubtedly the enterprise is carried on by the Company and its wholly-owned subsidiary, Yellowstone Park Lines, Inc., and is recreational in character.

The trial court made special findings in support of the motion for summary judgment and in these findings it described in detailed fashion the operation of the Yellowstone Park Company within the Yellowstone National Park pointing out that there is central management of the

numerous facilities within the Park headed up by officers of the Company and a member of the so-called department directors such as director of marketing and sales, director of food and beverage and the director of lodging. According to the findings, some 2,289 people, mostly college students, were at the time in question employed by the Yellowstone Park Company.

The court pointed out that the controlling provision of the Fair Labor Standards Act is 29 U.S.C. § 213(a)(3) and said:

> If Yellowstone Park Company qualifies as an amusement or recreational establishment within the meaning and for the purpose of that section, the Company is exempt from Sections 6 and 7 of the Act, 29 U.S.C. §§ 206 and 207, pertaining to minimum wages and maximum hours.

The court went on to hold that as a result of the integrated management of the Company it was a recreational establishment and concluded in its judgment:

> After considering the pleadings, the interrogatories and answers thereto, the affidavits filed herein and exhibits attached thereto, the request for admissions and the stipulation filed by the parties herein wherein each of the parties agreed there is no dispute as to any genuine issue of fact, and now being fully advised in the premises, the Court finds that 29 U.S.C. Section 213(a)(3) exempts the defendants from the minimum wage and overtime provisions of said Act * * *

The exemption which we are now considering was provided in the Fair Labor Standards Act so as to allow recreational facilities to employ young people on a seasonal basis and not have to pay the relatively high minimum wages required by the Fair Labor Standards Act. Based on this legislative purpose the Company maintains that the provision should be given a liberal construction so as to carry out this basic purpose. This is, however, contrary to accepted rules of construction which call for broadly construing coverage provisions and narrowly construing the exemption provisions. Also, it runs contrary to the decisions of the Supreme Court and at least one decision of this court.

An early Supreme Court case, Phillips Co. v. Walling, 324 U.S. 490 (1945), considered the term "retail establishment" in connection with an exemption provided for in § 13 (a)(2). Involved in the *Phillips* case was a chain enterprise consisting of 49 grocery stores together with a central warehouse and office building. It was argued in that case, much in the same manner as it is argued here, that the numerous stores, the warehouse and the office building were a single establishment so as to bring the entire enterprise within the exemption. This integration argument was, however, rejected by the Supreme Court which held that Congress used the word "establishment" to mean a distinct physical place of business rather than an integrated business or enterprise. Each unit was, therefore, held to be a separate establishment.

Much the same result was reached in Mitchell v. Bekins Van & Storage Co., 352 U.S. 1027 (1957), wherein it was held that the exemption did not apply to physically separate

warehouses even though they were operated as a single economic unit. Once again the emphasis was placed on the term "establishment" and it meaning a single physically separate place of business.

Finally, this court in Shultz v. Adair's Cafeterias, Inc., 420 F.2d 390 (10th Cir. 1969), had before it a case involving six cafeterias having a central bakery. The employer argued that the establishment as a whole was entitled to an exemption and the district court agreed. This decision was, however, reversed, our court ruling that the district court's determination had failed to follow the interpretation which had been given to the term "retail establishment" by the Supreme Court in the *Phillips Co.* and *Mitchell* cases. In reversing the district court it was said:

> The lower court refused to test the Adair enterprise, for exemption, on an individual establishment basis. Instead, all businesses, including the bakery, were viewed together as being proprietarily united and functionally integrated, and physical separation was considered immaterial. This proposition runs directly contrary to the letter and spirit of the Fair Labor Standards Act and does not comport with the cases interpreting that law.

420 F.2d at 394.

After discussing the applicability of the *Phillips Co.* and *Mitchell* rulings this court continued:

> The exemption in § 213(a)(2) has a limited reach, touching only those retail or service establishments as are comparable to the local corner grocery store, local

> drug store or local department store which sells directly to the ultimate consumer. Prosperous retail businesses eventually lose their identity as establishments exempt from the Act. It may occur through an increased volume of interstate sales or, as here, by physically serving a nonexempt establishment. A company operating numerous food stores cannot include as a part of its retail business its candy kitchens. Fred Wolferman, Inc. v. Gustafson, 169 F.2d 759 (8th Cir. 1948). The operator of sandwich counters cannot include as retail its commissary where sandwiches are prepared. Armstrong Co. v. Walling, 161 F.2d 515 (1st Cir. 1947). Similarly, a restaurant-cafeteria chain may not include its bakery as part of its retail establishments.

420 F.2d at 394-95.

We view *Adair's* as being not only definitive of the term "establishment", but also as illustrating the broad coverage —narrow exemption approach to this Act.

We recognize that there are differences between the so-called recreational exemption which we are now considering and the retail establishment exemption considered in *Adair's Cafeterias* and in *Phillips Co.* as well as *Mitchell.* Much of the law which deals with the retail establishment exemption is concerned with the difference between retail and wholesale activities and with the question whether the particular retail unit is engaged in local business or interstate commerce. None of this, however, affects the basic issue presented to us which is whether the term "establish-

ment" as used in § 13(a)(3) is to be judged in the same light as that term is judged under § 13(a)(2) and as in *Phillips Co.*, *Mitchell* and *Adair's*. We are of the opinion that the distances and the heterogeneous nature of the areas of interest do not lend to the Yellowstone Park enterprises being considered as one integrated unit subject to exemption under § 13(a)(3). Thus, we must reverse the trial court's judgment holding that all of Yellowstone Park is to be considered as a single integrated recreational area.

The parties have stipulated that the plaintiff is entitled to an injunction restraining future violation of the Act if it prevails on the question of what constitutes an establishment for purposes of § 13(a)(3) of the Act. Therefore, having resolved this issue in favor of the plaintiff-appellant, it follows that the cause must be reversed and an injunction is to be granted and entered in favor of the plaintiff and against the defendants.

Inasmuch as a question existed at the time that this matter was orally argued as to the scope of the employees exempted and the employees covered, clarification was requested. Since the cause was argued there has been an exchange of letters and in essence the employees exempted are those who are employed by an exempt establishment. Those who are covered are, generally speaking, those central employees who serve several or all of the Company's establishments at various locations throughout the Park. In its clarification letter plaintiff-appellant adds:

> We concede the applicability of the exemption to all of defendants' employees in the Park, including maids and boiler room workers, *except* central employees who

perform functions which serve several, or all, of the company's establishments at the various locations throughout the Park. Among those *not* within the exemption are the following: (1) central accounting office employees (R. 39, 46-48); (2) manager's office employees (R. 48-50); (3) reservations office employees (R. 48-50); (4) advertising and promotion office employees (R. 48-50); (5) laundry employees (R. 40, 51-52); (6) print shop employees (R. 40, 52-53); (7) personnel office employees (R. 40, 54-55); (8) warehouse employees (R. 40, 54-55); (9) garage employees (R. 40, 54-55); (10) ice manufacturing plant employees (R. 29, 40); (11) central fire watch employees (R. 56-57); and (12) central maintenance and repair workers who perform functions which serve several or all of the company's establishments in the Park (R. 51, 60-61). Since these central employees are not employed by any specific establishment, but rather by the entire enterprise, they would be exempt only if *all* of the defendants' facilities throughout the Park constitute a single "establishment."

In our view the concession contained in the plaintiff-appellant's letter is entirely consistent with the view which we have taken as to the meaning of the term "establishment."

Accordingly, the judgment of the district court is reversed, and the cause is remanded with directions to the district court to enter an injunction in accordance with the views expressed above.

APPENDIX D

Other Statutes Involved

"§213. *Exemptions*

(a) The provisions of section 206 . . . and section 207 of this title shall not apply with respect to—

• • •

(2) any employee employed by any retail or service establishment . . . if more than 50 per centum of such establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, and such establishment is not in an enterprise described in section 203(s) of this title or such establishment has an annual dollar volume of sales which is less than $250,000 (exclusive of excise taxes at the retail level which are separately stated). A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry;"

Section 213(b)(8) provides:

"(b) The provisions of section 207 of this title shall not apply with respect to—

• • •

(8) any employee employed by an establishment which is a hotel, motel, or restaurant; • • • "

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-51

YELLOWSTONE PARK LINES, INC., ET AL., PETITIONERS

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C) is reported at 478 F. 2d 285. The findings of fact of the district court (Pet. App. B) and the summary judgment of that court (Pet. App. A) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1973. The petition for a writ of certiorari was filed on July 3, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

521-187

QUESTION PRESENTED

Whether petitioners' enterprise in Yellowstone National Park consisting of numerous physically distinct and widely scattered places of business—including hotels, inns, motels, lodges, cabins and restaurants—is a single "amusement or recreational establishment" within the exemption provided by Section 13(a)(3) of the Fair Labor Standards Act, 29 U.S.C. 213(a)(3).

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*, are set forth in the petition (Pet. 3–4) and in its appendix (Pet. App. D).

STATEMENT

This action was brought by the Secretary of Labor to enjoin petitioners from violating the Act's minimum wage, overtime and recordkeeping requirements with respect to certain employees working at petitioners' facilities at Yellowstone National Park. Petitioners stipulated that their business is an "enterprise" within the Act's coverage and that their employees have not been paid the minimum wages required by the Act (R. 179–180).[1] However, petitioners claimed that they have a single "establishment" in the park and that their employees are "employed by an establishment which is an amusement or recreational establishment" and, thus, exempt under Section 13(a)(3), 29 U.S.C. 213(a)(3) (R. 181).

[1] "R." refers to the record filed in the court of appeals.

Pursuant to an agreement with the National Park Service, petitioners operate as one of several concessioners within the park, where they maintain hotels, inns, lodges, cabins and restaurants (R. 169, 240–241). These facilities are located at such widely separated points as Mammoth Hot Springs, Old Faithful, Yellowstone Lake and Canyon Village, and they vary substantially in individual size and available features.[2] The employees work under a company employment agreement but are primarily attached to a single facility with an on-site manager (R. 205).

The Secretary conceded that all of petitioners' 2,300–2,500 employees in the park, except approximately 200 central employees, were exempt under Section 13(a)(3). The 200 central employees perform functions which serve several, or all, of the companies' establishments at the various locations throughout the park. They include: (1) central accounting office employees (R. 39, 46–48); (2) manager's office employees (R. 48–50); (3) reservations office employees (R. 48–50); (4) advertising and promotion office employees (R. 48–50); (5) laundry employees (R. 40, 51–52); (6) print shop employees (R. 40, 52–53); (7) personnel office employees (R. 40, 54–55); (8) warehouse employees (R. 40, 54–55); (9) garage employees (R. 40, 54–55); (10) ice manufacturing plant employees

[2] For example, the facilities at Mammoth Hot Springs are located approximately 51 miles from the facilities at Old Faithful; the facilities at West Thumb near Yellowstone Lake are located approximately 68 miles from Mammoth; and the facilities at Roosevelt Lodge on the Yellowstone River are about 60 miles from the Old Faithful facilities and some 56 miles from the facilities at West Thumb (R. 169).

(R. 29, 40); (11) central fire watch employees (R. 56–57); and (12) central maintenance and repair workers who perform functions which serve several or all of the companies' establishments in the park (R. 51, 60–61). The Secretary contended that since these central employees are not employed by any specific establishment, but rather by the entire enterprise, they would be exempt only if all of petitioners' facilities throughout the park constitute a single "establishment."

The district court sustained petitioners' motion for summary judgment and dismissed the complaint (R. 247–248). The court of appeals reversed, holding that the word "establishment" as used in the Act means "a distinct physical place of business rather than an integrated business or enterprise" (Pet. App. c7), and that "the distances and the heterogeneous nature of the areas of interest do not lend to the Yellowstone Park enterprises being considered as one integrated unit subject to exemption under § 13(a)(3)" (*id.* at c10).

ARGUMENT

The decision below is correct, does not conflict with any decision of another court of appeals and does not present any issue warranting review by this Court.

1. As the opinion of the court of appeals emphasizes, the meaning of the term "establishment" in the Fair Labor Standards Act was settled by this Court 28 years ago in *Phillips Co.* v. *Walling,* 324 U.S. 490. There a chain enterprise, consisting of 49 grocery stores and a separate warehouse and central office building, claimed to be a "retail establishment" ex-

empt from the Act under Section 13(a)(2), 29 U.S.C. 213(a)(2). This Court rejected the claim, holding that "Congress used the word 'establishment' * * * as meaning a distinct physical place of business," not "an entire business or enterprise" (324 U.S. at 496). Accord, *Mitchell* v. *Bekins Van & Storage Co.*, 352 U.S. 1027.[3]

The courts of appeals have repeatedly held that multi-unit enterprises do not constitute a single "retail establishment" exempt from the requirements of the Act. See, *e.g.*, *Shultz* v. *Adair's Cafeterias, Inc.*, 420 F. 2d 390, 393–395 (C.A. 10); *Shultz* v. *Kip's Big Boy, Inc.*, 431 F. 2d 530, 535 (C.A. 5); *Mitchell* v. *Sunshine Department Stores, Inc.*, 292 F. 2d 645, 647–648 (C.A. 5); *Mitchell* v. *Birkett*, 286 F. 2d 474, 476–477 (C.A. 8); *McComb* v. *Wyandotte Furniture Co.*, 169 F. 2d 766, 769 (C.A. 8); *Fred Wolferman, Inc.* v. *Gustafson*, 169 F. 2d 759, 761 (C.A. 8); *Walling* v. *Goldblatt Bros.*, 152 F. 2d 475, 477–478 (C.A. 7), certiorari denied, 328 U.S. 854; *Mitchell* v. *E. G. Shinner and Company*, 221 F. 2d 260, 262 (C.A. 7); and *cf. Wirtz* v. *Keystone Readers Service, Inc.*, 418 F. 2d 249, 254 (C.A. 5).

[3] In *Bekins Van & Storage Co.*, the Court referred to an excerpt from the legislative history of the 1949 Amendments to the Act (63 Stat. 917) specifically approving the *Phillips* definition of the term "establishment." In the excerpt referred to by the Court, Senator George had stated that "the word 'establishment' has been very well defined in the Wage and Hour Act. It means now a single physically separate place of business * * * and it does not mean an entire business enterprise." 95 Cong. Rec. 12579. See also, the Reports of both the House and Senate at 95 Cong. Rec. 14877, 14932, and Senator Holland's remarks at 95 Cong. Rec. 12505.

While these decisions construed the term "establishment" in the "retail establishment" exemption, Section 13(a)(2), 29 U.S.C. 213(a)(2), they are controlling in construing that term in Section 13(a)(3), 29 U.S.C. 213(a)(3). Prior to the Fair Labor Standards Amendments of 1966 (80 Stat. 830), Section 13(a)(2) exempted from the Act's requirements "any employee employed by any retail * * * establishment * * * if such establishment—* * * (ii) * * * is an amusement or recreational establishment that operates on a seasonal basis * * *" (75 Stat. 71). See S. Rep. No. 145, 87th Cong., 1st Sess. The 1966 Amendments deleted this provision, and gave the amusement and recreational establishment exemption independent status in Section 13(a)(3); the amendments also added two specific tests of seasonal operation. But nowhere in the legislative history of the 1966 Amendments is there any indication that Congress intended the word "establishment" to have a broader meaning in Section 13(a)(3) than the well settled definition which it had under Section 13(a)(2).

2. Contrary to petitioners' assertion (Pet. 7), there is no conflict among the circuits as to the meaning of the word "establishment." Petitioners' main contention, that the decision of the court below conflicts with the Fifth Circuit's decision in *Hodgson* v. *Hasam Realty Corp.*, 442 F.2d 1336 (C.A. 5), affirming *per curiam sub nom. Shultz* v. *Hasam Realty Corp.*, 316 F. Supp. 1136 (S. D. Fla.), overlooks the substantially different factual circumstances of that case. In *Hasam*, a five-unit resort hotel complex was held to be a single

"establishment" whose central employees were exempt under Section 13(b)(8), 29 U.S.C. 213(b)(8), of almost 3,500 square miles (R. 169). Between these employees of "an establishment which is a hotel, motel, or restaurant." Not only were all of the *Hasam* facilities a functional, cohesive unit operating under the common name "Diplomat," but four of them were contiguously located on a relatively small parcel of land owned entirely by the corporate enterprise, and were separated only by a road or an inland waterway.[4] In contrast, the various facilities operated by petitioners are located in widely separated areas of a publicly owned and maintained national park consisting of almost 3,500 square miles (R. 169). Between these facilities lie hundreds of square miles of national park land which the companies do not own, lease or in any way utilize or control. Indeed, the only physical connection which these facilities share is their location in the same vast national park.

Nor is there any merit to petitioners' claim (Pet. 12) that the decision below conflicts with those of the Sixth, Seventh and Eighth Circuits in *McComb* v. *W. E. Wright Co.*, 168 F.2d 40 (C.A. 6); *Walling* v. *Goldblatt Bros.*, 152 F.2d 475 (C.A. 7); *Fred Wolfer-*

[4] The decision in *Hasam* was based on Section 779.305 of the Department's Interpretative Bulletin concerning retailers of goods and services (29 C.F.R. 779.305). That section sets forth three tests for determining whether various portions of a business constitute a single establishment or separate establishments: (1) physical separation; (2) functional integration; and (3) interchange of employees. These tests have no pertinence here, since their application is expressly limited to situations where "retailing and other functionally unrelated activities [are] performed *on the same premises*" (emphasis added).

man, Inc. v. *Gustafson,* 169 F.2d 759 (C.A. 8); and *McComb* v. *Wyandotte Furniture Co.,* 169 F.2d 766 (C.A. 8). In those cases, the courts denied "retail establishment" exemptions to non-retail units of multi-unit retail enterprises on the ground that the units did not perform a "retail" function. These decisions in no way conflict with the holding below that petitioners' physically distinct places of business constitute separate establishments.

3. Although petitioners now seek review of the question whether employees who perform services for more than one recreational establishment are exempt under Section 13(a)(3) of the Act, this point was not before the courts below. As the court of appeals pointed out, "[t]he parties have stipulated that the plaintiff is entitled to an injunction * * * if it prevails on the question of what constitutes an establishment for purposes of § 13(a)(3) of the Act" (Pet. App. c10; R. 181). In view of this stipulation, petitioners are precluded from raising the question now. *Safeway Stores* v. *Oklahoma Grocers,* 360 U.S. 334, 342, n. 7; *Walters* v. *City of St. Louis,* 347 U.S. 231, 233; *United States* v. *New York Tel. Co.,* 326 U.S .638, 650–651, n. 18.

In any event, the central employees, even those who are physically located in a single "establishment," are not employed "*by* * * * an amusement or recreational establishment" (Section 13(a)(3), 29 U.S.C. 213(a)(3)). In *Mitchell* v. *Kroger Company,* 248 F. 2d 935, 940 (C.A. 8), the court, speaking of traveling auditors who made audits at their employer's chain of retail

stores, said that the "[retail establishment] exemption * * * does not include those who happen to be engaged at but not 'employed by' an exempt retail establishment, even though perchance they might perform their functions literally inside the exempt establishment." Like the auditors in *Kroger*, the central employees here are "functionally related to the entire business of the [enterprise], regardless of the fact that their services are performed mainly inside [the exempt establishments]" (*id.* at 941). Plainly, therefore, the central employees are not exempt under Section 13(a)(3).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

WILLIAM J. KILBERG,
Solicitor of Labor,
CARIN ANN CLAUSS,
Associate Solicitor,
DONALD S. SHIRE,
JOHN K. LIGHT,
Attorneys,
Department of Labor.

SEPTEMBER 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973

Supreme Court
F i l. E
SEP 27
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-51

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,

Plaintiff-Respondent,

—v.—

YELLOWSTONE PARK LINES, INC., a corporation, and
YELLOWSTONE PARK COMPANY, a corporation,

Defendants-Petitioners.

PETITIONERS' REPLY BRIEF

LOVEJOY, WASSON, LUNDGREN & ASHTON
Attorneys for Petitioners
250 Park Avenue
New York, New York 10017

DOUGLAS FOSTER
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-51

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,

Plaintiff-Respondent,

—v.—

YELLOWSTONE PARK LINES, INC., a corporation, and
YELLOWSTONE PARK COMPANY, a corporation,

Defendants-Petitioners.

PETITIONERS' REPLY BRIEF

Petitioners submit this short reply brief in order to bring to this Court's attention certain new legislation and to reply to respondent's brief in opposition to the Petition.

New Legislation

Since petitioners filed their Petition for a Writ of Certiorari, Congress has proposed and adopted a number of amendments to the Fair Labor Standards Act of 1938 after a thorough review of the Act, its coverage and the exemptions. These amendments would have, if enacted and signed into law, extended the coverage of the Act. Congress specifically revoked several of the exemption provisions under Section 13(a). It is important to note, however, that Con-

gress left intact the exemption for employees of amusement or recreational establishments provided by Section 13(a)(3). This reinforces petitioners' contention that Congress purposely and consciously determined in 1966 that employees who were employed by recreational establishments should be exempt and that even today, when Congress favors even broader coverage of the Act, Congress still favors exemption for recreational employees. However, under the very narrow and restrictive interpretation of Section 13(a)(3) advocated by the Department of Labor and adopted by the Tenth Circuit, many employees of recreational establishments, even though those establishments meet the seasonal tests prescribed by Congress, will not be exempt because most recreational operations consist of two or more physically separate facilities.

Reply to Respondent's Brief

A. *Respondent's Statement Answered.*

The Solicitor General's brief points out, on p. 3, that the Secretary conceded below that all of petitioners' 2,300-2,500 employees are exempt except for approximately 200 central employees. This concession illustrates the absurdity of the Secretary's position and, indeed, of the decision of the Tenth Circuit. The District Court found, and the Tenth Circuit did not rule otherwise, that all those employed by Yellowstone are employed for the same purpose, namely, to provide recreation for the millions of visitors to Yellowstone Park. Moreover, all employees are hired by Yellowstone, are employed under the same Work Agreement, are assigned to its various facilities according to the needs of Yellowstone and are reassigned from

time to time to meet those needs. Under those circumstances it makes no sense to say that approximately 2,000 employees of Yellowstone are exempt while approximately 200 others are not exempt. Such a distinction is proper in those retail-wholesale cases cited by respondent on pages 4 and 5 of its brief, for in those cases certain of the employees of the company asking exemption under Section 13(a)(2) were retail employees who dealt directly with the public, whereas other employees were wholesale employees who worked in a warehouse and did not deal directly with the public. In contrast, all of Yellowstone's employees service and accommodate the public. There should be no difference, therefore, in the applicability to them of the Fair Labor Standards Act.

B. ***Respondent's Argument Answered.***

1. 1966 Amendments

In his brief in opposition to petitioners' Petition for a Writ of Certiorari, the Solicitor General acknowledges that Congress gave independent status to the amusement and recreational establishment exemption in 1966. He also notes that the amendment added two specific tests of seasonal operation. He concludes, however, that Congress intended the word "establishment" to have the same definition in Section 13(a)(3) as it has in Section 13(a)(2). This conclusion is, we submit, a non sequitur.

First, it should be noted that there is no definition of "establishment" in Section 13(a)(2). Second, Congress made an express determination in 1966 to set apart recreational establishments from retail establishments. Congress prescribed certain specific tests for each. In Section 13(a)(2), a retail establishment is defined as "an establishment

75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry." Section 13(a)(3) provides that an establishment is an amusement or recreational establishment "if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33⅓ per centum of its average receipts for the other six months of such year; . . . ". The two sections involve different operations, were adopted for different reasons (as more fully described in the Petition) and prescribe different tests. Therefore, rather than supporting the Solicitor General's contention, the specific act of Congress in 1966 in adopting a separate exemption for recreational establishments supports petitioners' contention that whatever meaning may have been given to "establishment" in Section 13(a)(2) by this Court's dictum in *Phillips Co.* v. *Walling*, 324 U.S. 490 (1945), should not determine the meaning of "establishment" in the recreational establishment exemption.*

2. Conflict in the Circuits

In discussing the decisions of the Sixth, Seventh and Eighth Circuits at pages 7 and 8 of his brief, respondent misses the point. Respondent states that the courts denied "retail establishment" exemptions to non-retail units of multi-unit retail enterprises on the ground that the units did not perform a "retail" function. Petitioners do not dis-

* However, even assuming *arguendo* that it should, the essential question still is: what test or tests should be applied to determine if several facilities constitute an "establishment". As this Court indicated in *Phillips*, the primary test is functional.

agree with this. However, the point is that these courts made that determination on the basis of the functional nature of the units and not on some physical or geographic test which was the sole test applied by the Tenth Circuit in this case. If the Sixth, Seventh and Eighth Circuits in those cases had applied a physical test, then those non-retail units would have been granted an exemption, a result which clearly would have been improper. If the Tenth Circuit had applied a functional test here rather than a physical test, all of petitioners' facilities would have been found to be a single establishment and all of their employees exempt under Section 13(a)(3).

3. Questions Presented

Petitioners should not be precluded from now arguing that employees who perform services for more than one exempt recreational establishment are exempt from the provisions of the Act. The Tenth Circuit implicitly found that each of Yellowstone's facilities constituted an exempt recreational establishment.* On the basis thereof petitioners are only asserting what logically follows, namely that employees who work at more than one of these exempt establishments are exempt. They are only asking this Court to consider a question which arose for the first time due to the decision of the Tenth Circuit. *Duignan* v. *U. S.*, 274 U.S. 195, 200 (1927); *Terminiello* v. *City of Chicago*, 337 U.S. 1 (1949); *In re Linda Coal and Supply Co.*, 255 F.2d 653 (3rd Cir. 1958).

* The stipulation referred to by respondent should not be a bar to the raising of this question. Petitioners and the Secretary entered into that stipulation to avoid the necessity of a prolonged trial concerned with a number of issues that were or may have been relevant to whether each of petitioners' separate facilities was an exempt establishment.

Moreover, the question of whether employees who are employed by two or more exempt establishments are exempt is "sufficiently closely related" (*Boynton* v. *Virginia*, 364 U.S. 454 at 457) to the question of whether the Yellowstone facilities either are an "establishment" or are rather several establishments that this Court may properly consider the question. The two questions are interrelated and interdependent and rest upon the definition of "establishment", and the answer to the second question is a corollary of the answer to the first. If this Court should find that all of Yellowstone's facilities are not one establishment, it should necessarily answer the second question in order to dispose of this matter.

CONCLUSION

For the reasons set forth in the Petition and herein, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LOVEJOY, WASSON, LUNDGREN & ASHTON
Attorneys for Petitioners
250 Park Avenue
New York, New York 10017

DOUGLAS FOSTER
Of Counsel